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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether an agency acts arbitrarily and capriciously in rescinding a rule that has not yet taken effect, when changed circumstances leave substantial uncertainty that the rule will produce the benefits on which its initial promulgation was premised and such uncertainty would have permitted the agency to decline to issue the rule in the first instance.

2. Whether the National Highway Traffic Safety Administration (NHTSA) acted arbitrarily and capriciously in rescinding the requirement in Motor Vehicle Traffic Safety Standard 208 that new vehicles produced after September 1983 be equipped with passive restraints for occupants, in view of changed circumstances since the requirement was adopted in 1977 and substantial uncertainty that the Standard would lead to a significant increase in the use of occupant restraints.

3. Whether the court of appeals exceeded the proper limits on judicial review by ordering the passive restraint requirement in Standard 208 into effect on September 1, 1983, without first affording NHTSA an opportunity to conduct further proceedings on remand or to exercise the authority conferred on the Secretary by 15 U.S.C. 1392 (c) and (e) to establish a new effective date for the Standard.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Department of Transportation, the Secretary of Transportation, the National Highway Traffic Safety Administration, and its Administrator, petitions for a writ of certiorari to review the judgment and supplemental order of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The June 1, 1982 opinion of the court of appeals (Pet. App. 1a-78a)[1] is reported at 680 F.2d 207. The August 4, 1982 supplemental order and memorandum of the court of appeals (Pet. App. 79a-82a) are not reported.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, No. 82-354, which also seeks review of the decision and supplemental order of the court of appeals in this case.

The decision of the Administrator of the National Highway Traffic Safety Administration rescinding the passive restraint requirements of Federal Motor Vehicle Safety Standard 208 (Pet. App. 88a-129a) is published at 46 Fed. Reg. 53419.

JURISDICTION

The jurisdiction of the court of appeals rested on 15 U.S.C. 1394(a)(1). The judgment of the court of appeals (Pet. App. 160a-161a) was entered on June 1, 1982, and the supplemental order of the court of appeals (Pet. App. 79a-80a) was entered on August 4, 1982. On August 24, 1982, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 1394 (a)(4).

STATUTORY PROVISIONS INVOLVED

1. Section 103 of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. 1392, provides in pertinent part:

> (a) The Secretary shall establish by order appropriate Federal Motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.
>
> (b) Subchapter II of chapter 5, and chapter 7 of Title 5 shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard under this subchapter.
>
> * * * * *
>
> (e) The Secretary may by order amend or revoke any Federal motor vehicle safety standard established under this section. Such order shall specify the date on which such amendment or revocation is to take effect which shall not be sooner than one hundred and eighty days or later than one year from the date the order is issued, unless the Secretary finds, for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.

(f) In prescribing standards under this section, the Secretary shall—

(1) consider relevant, available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this chapter;

(2) consult with the Vehicle Equipment Safety Commission, and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

STATEMENT

1. In 1966 Congress enacted the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. (& Supp. IV) 1381 *et seq.*, for the purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. 1381. To accomplish this goal, the Act directs the Secretary of Transportation[2] to issue motor vehicle safety standards (15 U.S.C. 1392(a)) and prohibits the manufacture, sale, or delivery into commerce of any motor vehicle that is not in conformity with such standards. 15 U.S.C. 1397.

The Act provides, however, that each safety standard "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. 1392(a). In addition, in issuing the standards, the Secretary is directed to consider: (i) "relevant available motor vehicle safety data," (ii) whether any pro-

[2] The Secretary's general authority under the Safety Act has been delegated to the Administrator of the National Highway Traffic Safety Administration. 49 C.F.R. 1.50(a).

posed standard "is reasonable, practicable and appropriate for the particular type of motor vehicle," and (iii) "the extent to which such standards will contribute to carrying out the purposes of [the Act]." 15 U.S.C. 1392 (f)(1), (3) and (4).

The Act explicitly grants the Secretary authority to "amend or revoke any Federal motor vehicle safety standard" (15 U.S.C. 1392(e); see also 15 U.S.C. 1407)). The Act also provides that the procedural and judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; 5 U.S.C. 701 *et seq.*, shall apply to the issuance of all orders establishing, amending, or revoking such a standard. 15 U.S.C. 1392(b); see also 15 U.S.C. 1410b(c)(2).

2.a. In 1967, the Secretary of Transportation promulgated Motor Vehicle Safety Standard 208, which required the installation of seat belts in all cars. 32 Fed. Reg. 2408, 2415. In 1972, the Secretary issued an order amending Standard 208 to require "complete passive protection" for all front seat occupants of vehicles manufactured after August 15, 1975. Vehicles built between August 1973 and August 15, 1975 were to be fitted either with passive restraints—devices that do not depend for their effectiveness upon any action taken by the occupants except that necessary to operate the vehicle—or with lap and shoulder belts coupled with an ignition interlock to prevent the car from starting unless the occupants' belts were fastened. 37 Fed. Reg. 3911. On petitions for review of the amended Standard, the United States Court of Appeals for the Sixth Circuit upheld the agency's decision to require passive restraints as a "proper exercise of its administrative discretion," but concluded that the testing procedures required for passive belts did not satisfy the Act's requirement that a standard be "objective." *Chrysler Corp.* v. *Department of Transportation*, 472 F.2d 659, 674, 675-678 (6th Cir. 1972).

The Sixth Circuit's decision did not affect the validity of the ignition interlock requirement, but public irrita-

tion with such systems led Congress in 1974 to prohibit any motor vehicle safety standard from requiring compliance by means of an ignition interlock or a continuous buzzer designed to indicate that safety belts are not in use. 15 U.S.C. 1410b(b)(1); see Pet. App. 8a. The National Highway Traffic Safety Administration (NHTSA) had concluded the previous April that passive belts should have an emergency release mechanism in the form of a conventional latch, accompanied by an ignition interlock and warning buzzer to encourage reattachment. 39 Fed. Reg. 14593 (1974). In view of the statutory amendment, however, NHTSA eliminated the ignition interlock and buzzer aspects of the emergency detachment requirement (Pet. App. 9a-10a; 39 Fed. Reg. 38380 (1974)). The statutory amendments of 1974 also provided that any safety standard requiring compliance by means of an occupant restraint system other than a belt system—*e.g.*, airbags—would be subject to disapproval by concurrent resolution of Congress. 15 U.S.C. 1410b (b)-(d).

b. In response to the decision of the Sixth Circuit and the 1974 legislation, NHTSA revoked the mandatory automatic restraint requirement and extended the optional alternatives for compliance with Standard 208 until August 31, 1976. 40 Fed. Reg. 33977. Shortly before August 31, 1976, Secretary Coleman initiated a new rulemaking proceeding on the issue. 41 Fed. Reg. 24070. After hearing testimony and reviewing written comments, Secretary Coleman extended the optional alternatives indefinitely because of his expectation that there would be widespread public resistance to mandatory passive restraints. 42 Fed. Reg. 5071 (1977). He instead proposed a demonstration project involving up to 500,000 cars installed with passive restraints in order to smooth the way for public acceptance at a later date (Pet. App. 10a).

c. In July 1977, Secretary Adams decided that a demonstration program was unnecessary and instead adopted Modified Standard 208, at issue here. The Modified Standard mandated the phasing in of passive restraints

beginning with large cars in Model Year 1982 and extending to all cars by Model Year 1984. The two principal systems that would satisfy the Standard are airbags and seatbelts that move into place automatically when the occupant enters the vehicle and closes the door. On judicial review, the United States Court of Appeals for the District of Columbia Circuit found the Secretary's decision that airbags would be effective "rational," recognized that the assessment of public resistance to passive restraints was a "matter of judgment," and held that the Secretary had not abused his discretion in assessing the tradeoffs between the expected benefits and potential dangers of airbags. *Pacific Legal Foundation* v. *Department of Transportation*, 593 F.2d 1338, 1344, 1346, 1347 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979).

d. In February 1981, Secretary Lewis proposed a one-year postponement of the effective date of Modified Standard 208 to permit further study in light of changed circumstances since the Standard was promulgated in 1977. 46 Fed. Reg. 12033. Two months later NHTSA issued a final rule ordering a one-year delay in the application of the Standard to large cars until September 1982. 46 Fed. Reg. 21172 (1981). In a notice published the same day, the Secretary proposed and requested comment on four possible modifications of the Standard: (1) reversal of the phase-in sequence to require compliance by small cars first, (2) simultaneous compliance by all cars, (3) rescission of the automatic restraint requirements, and (4) deletion of a requirement for restraints in the front center seating position. 46 Fed. Reg. 21205 (1981).

3. After receiving written comments and holding public hearings, NHTSA issued a final rule on October 29, 1981 amending Standard 208 to delete the passive restraint requirements. NHTSA explained that it had a duty under the Act "to review the automatic restraint requirements in light of changing events and to ensure that the requirements continue to meet the criteria which each Federal Motor Vehicle Safety Standard

must satisfy" (Pet. App. 93a).[3] On the basis of its thorough review, NHTSA determined that it was "incapable of finding now, as it was able to do in 1977, that the automatic restraint requirements would meet all of the applicable criteria in the Vehicle Safety Act" (*ibid.*).

a. NHTSA noted that its decision in 1977 that the Standard would produce significant safety benefits depended on several "critical assumptions" (Pet. App. 94a-95a), the validity of which had been "substantially if not wholly undermined by drastic changes in the types of automatic restraints that would have been installed under the automatic restraint requirements" (*id.* at 96a). First, although the agency had assumed in 1977 that airbags would be installed in 60% of all new cars and seat belts in 40%, manufacturers, for competitive reasons, in fact planned to install airbags in less than 1% of the cars. "Thus, the assumed life-saving potential of airbags would not have been realized" (*ibid.*).

Second, the agency determined that the automatic belts installed in the "overwhelming majority of new cars" would have been detachable. This design choice stemmed in part from a desire not to impede emergency exit and in part from concern that the public would resist belts not having this feature due to a fear of being trapped (Pet. App. 97a, 99a, 110a). NHTSA observed, however, that detachable belts "would be like today's manual lap and shoulder belts in that they can be easily detached and left that way permanently," and that their use "thereafter requires the same type of affirmative action that is the stumbling block to obtaining high usage levels of manual belts" (*id.* at 97a-98a).

Third, NHTSA found that although surveys of the use of automatic belts in Volkswagen Rabbits and Chevrolet Chevettes, conducted since Modified Standard 208 was promulgated in 1977, indicated usage rates as high as 70 or 80%, these studies suffered from a number of limi-

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[3] NHTSA also stated that the review was undertaken to ensure that the Standard meets the requirements of Exec. Order No. 12291. 46 Fed. Reg. 13193 (1981).

tations that rendered them unreliable as a basis for predicting usage of passive belts under the Standard generally: (1) the belts surveyed either had an ignition interlock or were continuous nondetachable belts and thus were dissimilar to the detachable belts most manufacturers intended to install to comply with Modified Standard 208; (2) the cars that were the subject of the surveys were not typical of the automobile fleet generally because a combination of owner demographics and a correlation between the driver's perception of risk and the size of the car ordinarily rendered usage rates higher in small cars; (3) most purchasers of the cars surveyed had voluntarily invested in automatic restraints; and (4) crash data for Rabbits revealed a significantly lower actual usage rate than did the surveys (*id.* at 97a-104a).

In the face of what it termed these "extremely sparse factual data," and recognizing that extrapolation from these data "necessarily involve[s] exercises of discretion and informed judgment" (Pet. App. 103a), the agency concluded that the change in car manufacturers' plans had left it without any basis for reliably predicting the likelihood that Modified Standard 208 would lead to any increased usage of restraints at all (*id.* at 99a). NHTSA observed in this regard that none of the participants in the rulemaking proceedings on the notice of proposed rescission issued in April 1981 had presented any new factual data to reduce the "substantial uncertainty" confronting the agency (*id.* at 101a). In view of this uncertainty, NHTSA could not find that mandatory automatic restraints "meet the need for safety" (*id.* at 104a), as required by the Act. 15 U.S.C. 1392(a).

b. NHTSA also concluded that the automatic restraint requirements did not satisfy the statutory mandate that a standard be "reasonable" and "practicable," in view of the possibly minimal safety benefits and the substantial cost of implementation (Pet. App. 105a). The agency noted that imposition of the passive restraint requirements would produce an annual nationwide price effect of "approximately $1 billion" (*ibid.*), and the agency found

no satisfactory assurance that consumers would receive offsetting discounts on insurance premiums in the foreseeable future. Finally, NHTSA estimated that the Standard would entail additional fuel costs of up to $150 million annually (*id.* at 106a, 117a).

The agency "[did] not believe that it would be reasonable to require car manufacturers or consumers to bear such substantial costs without more adequate assurance that they will produce benefits" (Pet. App. 106a). These costs are "particularly unreasonable," NHTSA explained, given the likelihood that other alternatives, such as its planned educational campaign, could accomplish the goal of increased usage at "greatly reduced costs" (*id.* at 107a; see *id.* at 111a-112a). An educational effort, NHTSA reasoned, has the advantage of reaching not only those purchasers of new cars likely to utilize passive restraints, but also persons driving in cars already on the road. "The potential for immediate impact is thus many times greater" (*id.* at 111a-112a).[4]

c. In addition, NHTSA concluded that the automatic restraint requirement might have an adverse effect on the public's attitude toward safety—an element of the statutory mandates that a standard be "practicable" (Pet. App. 93a) and "meet the need for safety" (*id.* at 114a). In the agency's view, "[n]o regulatory policy is of lasting value if it ultimately proves unacceptable to the public" (*id.* at 107a). Given the obtrusiveness, the relative expense, and the potentially limited benefits that might result from detachable belts that were substantially similar to existing manual belts, NHTSA feared that many consumers would regard the automatic restraint requirements as an expensive example of ineffective reg-

[4] A related factor was equity in the distribution of costs: "The automatic restraint requirements of the standard would have required the current regular user of manual belts not only to pay himself for a system that affords him no additional safety protection, but in part to subsidize the current nonuser of belts who may or may not be induced by the automatic restraints to commence regular restraint use" (Pet. App. 109a).

ulation (*id.* at 108a). Indeed, NHTSA observed that some dissatisfied consumers might even "cut the automatic belts out of their cars, thus depriving subsequent owners of the cars of the protection of any occupant restraint system"—a "serious concern[] for an agency charged by statute with taking steps appropriate for addressing safety problems that arise not only in the short term but also the long term" (*id.* at 108a-109a).

d. Having concluded that detachable automatic belts may contribute little to achieving higher belt usage rates, the agency considered but rejected requiring a use-compelling feature such as that in Rabbits and Chevettes. NHTSA noted that it lacked authority to require ignition interlocks and that the history of congressional reaction to interlocks suggested "that Congress would look with some disfavor upon any similar attempt to impose a use-compelling feature on a belt system" (Pet. App. 109a-110a). Furthermore, NHTSA explained that a use-compelling feature could actually be counterproductive, because of a "widespread, latent and irrational fear in many members of the public that they could be trapped by the seat belt after a crash" (*id.* at 110a). The agency expressed the view that it would be "highly inappropriate" to impose a technology that might aggravate that fear without first attempting a thorough education of the public (*ibid.*). Finally, although NHTSA recognized that extrication from a non-detachable continuous belt system is possible, it was "unable to find the cause of safety served by imposing any requirement which would further complicate the extrication of any occupant from his or her car, as some use-compelling features would" (*ibid.*)

4. On petitions for review, the United States Court of Appeals for the District of Columbia Circuit held that NHTSA's rescission of the automatic restraint requirement was arbitrary and capricious. The court acknowledged that "rescission more resembles agency refusal to act than an agency decision to act" and that it is "only in the rarest and most compelling circumstances that courts overturn an agency's 'expert' determination not

to pursue a particular program or policy at a given time" (Pet. App. 25a, quoting *WWHT, Inc.* v. *FCC*, 656 F.2d 807, 818-819 (D.C. Cir. 1981)). In this case, however, the court concluded that because Congress had not banned passive restraints when it banned interlocks (Pet. App. 33a-36a), had not vetoed the 1977 passive restraint requirement (*id.* at 36a-38a), and had considered but not passed legislation in 1980 to require the five largest automobile manufacturers to offer airbags in a single model line (*id.* at 38a-46a), NHTSA's freedom to rescind the rule had been restricted (*id.* at 46a-47a). The court then found that NHTSA's action within that narrowed ambit of authority was "arbitrary and illogical" for two general reasons:

a. The court first took issue with NHTSA's conclusion that it could not reliably predict an increase in usage under the Standard as written (Pet. App. 50a-54a). The Court expressly accepted as reasonable NHTSA's first two findings: that most manufacturers planned to install detachable seatbelts to satisfy the automatic restraint requirement and that a detachable belt, one detached, is functionally equivalent to a manual belt (*id.* at 50a-51a). The court also conceded that there may well be "substantial uncertainty" about the seatbelt usage rates that can be predicted if detachable belts are widely used (*id.* at 51a). But the court did not find this to be a sufficient basis for NHTSA's action. The court explained that it would be unreasonable for an agency to promulgate a regulation in the first instance simply because of "substantial uncertainty" that the status quo was any better (*ibid.*). Thus, the appropriate question in the court's view was not whether there was evidence showing that usage rates would increase by the amount necessary to justify the rule, but rather whether NHTSA could point to evidence affirmatively showing that they would not (*ibid.*).

The court found that the evidence in the record did not sustain NHTSA's burden on this issue. Moreover, the court reasoned that, if, as NHTSA had concluded, ex-

perience with passive belts now in use could not be the basis for predicting usage rates under the Standard, "then only a well justified refusal to seek more evidence could render rescission non-arbitrary" (Pet. App. 52a-53a).

b. A majority of the panel also concluded that rescission was arbitrary and capricious because NHTSA did not sufficiently consider certain alternatives to rescission of the rule.[5] The court stressed that NHTSA was "impressively thorough and careful" in reviewing three other options: reversing the sequence of compliance, ordering simultaneous compliance, and exempting the front center seating position (Pet. App. 55a)—the three alternatives to rescission set forth in the Notice of Proposed Rulemaking. 46 Fed. Reg. 21207 (1981).

The court nevertheless faulted NHTSA's consideration of the possibility of requiring manufacturers to install continuous rather than detachable automatic belts. The court first questioned whether detachable belts even satisfy the requirement of being a "passive restraint" if, upon detachment, they resemble manual belts. If detachable belts do not satisfy the requirement, the court observed, "NHTSA should have concentrated its analysis on safety devices that do" (Pet. App. 57a). In addition, the court found insufficient the reasons given by the agency for declining to permit only non-detachable continuous belts—that many members of the public fear being trapped in them and that NHTSA could not conclude that the cause of safety would be advanced by a device that might make it more difficult to extricate the occupant (*id.* at 60a-62a).

The court also held that NHTSA's action in rescinding the automatic restraint requirement was arbitrary and capricious because the agency did not consider permitting compliance only by the use of airbags, in view of

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[5] Judge Edwards did not accept the majority's discussion of possible alternative courses of action as a basis for decision in this case (Pet. App. 75a).

what the court perceived to be certain advantages of airbags over detachable and even continuous belts (Pet. App. 62a-65a). The court acknowledged, however, that the cost of airbags ranged from $200 to $1200 per unit, depending upon economies of scale, and that NHTSA had considered these costs in its regulatory impact analysis (*id.* at 65a-66a). The court further suggested that NHTSA should have addressed the possibility of undertaking a voluntary program for the installation of passive restraints, as Secretary Coleman previously had proposed (*id.* at 68a).

c. Although the court of appeals held that NHTSA had not validly rescinded the automatic restraint provisions of Modified Standard 208, the court nevertheless expressly "decline[d] the suggestion[] * * * that the standard take full effect by September 1983 * * * or by September 1982" (Pet. App. 72a). The court noted that manufacturers needed sufficient lead time to implement the passive restraint requirement. The court further observed that its decision did not foreclose rescission in the future if, as required by the court's opinion, NHTSA established that implementation of the Standard by means of detachable belts was inappropriate and analyzed the alternative courses of action the court identified (*id.* at 53a-54a, 73a). Moreover, the court observed that if NHTSA was uncertain that Modified Standard 208 would lead to sufficient usage increase to justify its enforcement, it could suspend, amend or delay its implementation (*id.* at 54a, 72a, 74a).

For the foregoing reasons, the court afforded NHTSA 30 days "in which to submit a schedule for resolving the questions raised in [the] opinion, leading either to the rescission or suspension of the standard or to a judicially approved schedule for the effective implementation of * * * [Modified Standard 208] or an amended standard" (Pet. App. 74a; see also *id.* at 72a). The court stressed that if "NHTSA finds non-arbitrary reasons for rescinding the standard, of course, its action will be affirmed" (*id.* at 74a).

5. On July 1, 1982, NHTSA filed with the court of appeals a suggested Notice of Proposed Supplemental Rulemaking setting forth, as required by the court's opinion, a schedule for seeking comments from interested parties on questions raised by the opinion and for issuing a supplemental decision on those questions (Pet. App. 132a-146a).[6] The suggested Notice specifically sought comments on the three principal issues identified by the court: uncertainty regarding "predicted usage of automatic restraint systems in general, and in particular of detachable automatic belts lacking an ignition interlock"—including suggestions about how to conduct surveys to obtain additional reliable evidence within a reasonable time and at reasonable cost (*id.* at 135a);[7] "regulatory alternatives such as amending the standard to require that all automatic belts be nondetachable or to limit means of compliance to airbags only" (*id.* at 136a); and NHTSA's "current efforts to seek voluntary commitments by automobile manufacturers to offer automatic restraints as options in fixed numbers of new cars * * * as well as any other suggestions to promote voluntary development of advanced occupant protection technology" (*ibid.*).

6. In a memorandum issued on August 4, 1982, the court stated that the suggested Notice of Proposed Supplemental Rulemaking filed by NHTSA to explain the manner in which it intended to proceed in response to the court's opinion "is not inconsistent with the Court's order" (Pet. App. 82a). Nevertheless, in a reversal of

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[6] The schedule provided that all comments be submitted to the agency within 30 days after publication of the Notice in the Federal Register, and that the agency would attempt to issue any supplemental decision setting forth its future course of action within 45 days thereafter.

[7] NHTSA appended to the suggested Notice a staff analysis of possible research studies to identify in a preliminary fashion some of the problems NHTSA perceived in various approaches, thereby enabling interested parties to focus their comments directly on those potential problems (Pet. App. 139a-146a).

its explicit rejection in the June 1 opinion of the suggestion that the court order the automatic restraint requirements into effect as of September 1, 1983 (*id.* at 72a), the court issued an order on August 4 accomplishing precisely that result. The court stated that although NHTSA was free to conduct further proceedings and to issue orders rescinding or modifying the passive restraint standard, subject to judicial review, "additional rulemaking is not required before Standard 208 takes effect" (*id.* at 82a). Accordingly, the court of appeals, sua sponte, issued an order staying the compliance dates for the passive restraint requirements in Standard 208 only until September 1, 1983. That order permits NHTSA until October 1, 1982, to advise the court whether the September 1, 1983 compliance date is achievable, or whether a longer period is required, "setting forth adequate reasons therefor" (*id.* at 79a-80a).[8]

REASONS FOR GRANTING THE PETITION

The court of appeals has held that, in order for an agency to rescind a rule—even one that has yet to take effect—it is not sufficient that the agency has developed substantial uncertainty that the rule will in fact produce the benefits on which its initial promulgation was premised. Rather, under the decision below, the agency must affirmatively establish to the satisfaction of the reviewing court that the rule in fact will not produce such benefits before it may be delayed or revoked. In other words, evidentiary doubts that would have allowed, indeed perhaps required, an agency not to issue a regulation in the first instance are insufficient to permit that agency, on further reflection, to withdraw the regulation.

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[8] Although it was not until its August 4 order that the court of appeals mandated imposition of Modified Standard 208 by a date certain, the court denied, for lack of good cause, the government's motion for an extension of time to file a petition for rehearing and/or rehearing en banc, even though that motion had been premised on the fact that until the court acted on NHTSA's proposed schedule, "the extent of judicially imposed obligations on [NHTSA was] unclear."

This unprecedented result disregards the explicit statutory limitations on judicial review contained in the Administrative Procedure Act. It cannot be "arbitrary and capricious" for an agency to conclude that there should be some firm indication that a regulation will serve a useful purpose before imposing its costs and burdens, especially those of the magnitude involved here, upon the public. The ratchet effect of the court of appeals' ruling—under which a policy adopted in the exercise of the agency's broad discretion and under a deferential standard of judicial review cannot be revised by the agency with the same facility—also is inconsistent with the decisions of this Court recognizing that administrative agencies must retain maximum flexibility to adapt their regulatory policies to changing circumstances.

In this case, the result is to require the agency to put into effect a rule that will cost in excess of $1 billion annually, despite NHTSA's determination that it cannot confidently predict that the rule will achieve significant safety benefits. In view of these substantial costs, the widespread effect of the decision below on virtually all members of the motoring public, and the longstanding controversy surrounding the issue of passive restraints, review by this Court is warranted on the circumstances of this case alone.

In addition, the decision below will serve as precedent in the District of Columbia Circuit, where the vast majority of petitions for review of administrative decisions are filed.[9] It therefore may substantially impede the ability of other federal agencies to revise their existing policies and chill the agencies in their development of new policies for fear of judicial obstacles to subsequent modification.

1. The National Traffic and Motor Vehicle Safety Act, 15 U.S.C. 1381 *et seq.*, empowers the Secretary of Trans-

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[9] See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 535-537 n.14 (1978).

portation to establish federal motor vehicle safety standards to accomplish the Act's purposes of reducing traffic accidents and deaths and injuries resulting from such accidents. 15 U.S.C. 1381, 1392(a). Congress provided, however, that the Secretary must satisfy certain criteria in order to promulgate such standards: they must be "appropriate," "practicable," and "stated in objective terms" and must "meet the need for motor vehicle safety." 15 U.S.C. 1392(a). These requirements are reinforced by 15 U.S.C. 1392(f)(3), which further provides that, in prescribing a standard, the Secretary must consider whether it is "reasonable, practicable and appropriate" for each type of vehicle to which it applies.

The Act does not contemplate that a standard once found to satisfy the statutory criteria must remain in effect permanently. To the contrary, 15 U.S.C. 1392(e) expressly provides that the Secretary "may by order amend or revoke any Federal motor vehicle safety standard established under this section." Congress did not specifically identify the criteria on which such an amendment or revocation may be based, but it is evident from the structure and purposes of the Act as a whole that the same conditions that govern the promulgation of a standard in the first instance are to inform the Secretary's decision to revise or rescind it. 15 U.S.C. 1392(a) and (f). The court of appeals in this case did not suggest otherwise.

Under 15 U.S.C. 1392(b), the provisions of the APA apply to judicial review of all orders issued by the Secretary establishing, amending, or revoking a safety standard. Therefore, as the court of appeals recognized (Pet. App. 25a-26a), NHTSA's order amending Modified Standard 208 to rescind its passive restraint requirements was subject to judicial review only to the extent of ensuring that the decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). This Court has stressed that this standard of review is "a narrow one" and that "[t]he court is not empowered to substitute its judgment for

that of the agency." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971); see also *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 555 (1978). Thus, the agency's decision must be upheld if it was "based on a consideration of the relevant factors" and there has been no "clear error of judgment." *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. at 416.[10]

2. NHTSA's revocation of the passive restraint requirement plainly was not "arbitrary and capricious" under the foregoing principles, and it therefore should have been sustained by the court of appeals. The agency's explanation of its reasons for rescission contained an extensive "consideration of the relevant factors"—the factors Congress specified in the Act itself[11]—and it reflects no "clear error in judgment." To the contrary, the rationale for the agency's decision is eminently sound.

a. First, on the basis of its fresh look at the efficacy of the passive restraint requirements, NHTSA was unable to find that they now "meet the need for safety" (Pet. App. 104a), as required by 15 U.S.C. 1392(a). The agency explained that this inability stemmed from the fact that several of the "critical assumptions" on which the Standard was based in 1977 had been "substantially if not wholly undermined" by intervening events (Pet. App. 94a-95a, 96a), because virtually all new cars were expected to be brought into compliance by means of belts that were detachable, in order to permit ready extrication in emergencies. The agency found that if such belts are detached, as they readily could be by those resistant to their use, they are virtually identical to manual belts. The agency therefore concluded that Modi-

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[10] See also *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 285 (1974).

[11] NHTSA identified the statutory criteria at the beginning of its decision, explaining the content of the statutory terms. See Pet. App. 93a.

fied Standard 208, when complied with by use of detachable belts, could not reliably be predicted to produce even a five percentage point increase in expected usage beyond the 11% usage rate experienced with manual belts now in use (*id.* at 104a; see generally *id.* at 17a, 94a-105a).[12]

The court of appeals expressly accepted as reasonable the agency's findings that most manufacturers intend to install detachable belts to satisfy the Standard and that such belts, once detached, are "functionally equivalent" to manual belts (Pet. App. 50a). The court of appeals also acknowledged that there may well be "substantial uncertainty" that the usage of passive restraints would increase significantly if manual belts in fact were replaced principally with detachable belts (*id.* at 51a). The agency's decision to revoke the passive restraint requirements in view of this uncertainty plainly reflects a "rational connection between the facts found and the choice made" (*Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974), quoting *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962)), and therefore was not arbitrary and capricious, without the need even to consider any other factors upon which the agency relied.

b. In view of the distinct possibility that the safety benefits that would be realized by Modified Standard 208 might be only minimal, while the costs of implementing automobile restraint requirements would be high, NHTSA likewise was unable to conclude that the incremental

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[12] NHTSA also gave a reasoned explanation for not retaining Modified Standard 208 in effect on the basis of extrapolations from the surveys of usage rates by occupants of certain Rabbits and Chevettes. Rabbit and Chevette automatic belts had use-compelling features that the belts to be installed in other vehicles would not have, and the surveyed restraints had in large part been voluntarily purchased by their owners. Moreover, the survey data related solely to subcompacts, and therefore were dependent upon owner demographics and the greater safety risk occupants perceive in smaller cars—factors that were viewed as unrepresentative of the general fleet of motor vehicles (Pet. App. 97a-104a).

costs of the requirements were "reasonable," as required by 15 U.S.C. 1392(f)(3). (Pet. App. 105a). The agency further concluded that the requirements were, in this respect, "impracticable" as well (*ibid.*; see 15 U.S.C. 1392(a)). See generally Pet. App. 105a-107a. The court of appeals did not question NHTSA's estimate that the costs associated with the implementation of the Standard would exceed $1 billion annually, that there would be additional economic effects resulting from a decline in demand for automobiles, and that even a partial offset through reductions in insurance rates was unlikely in the near term (*id.* at 16a-17a). The court also acknowledged that the possible safety benefits must be weighed against these costs (*id.* at 17a).[13] Against this background, NHTSA's conclusion that manufacturers and consumers should not be required to bear these substantial costs in the absence of any assurance of substantial safety benefits plainly reflects a rational consideration of the statutory criteria.

c. The agency further found that implementation of the passive restraint requirements could adversely affect the public attitude about safety, leading not only to a "poisoning of popular sentiment toward efforts to improve occupant restraint systems in the future" (Pet. App. 108a),[14] but also to a more far-reaching hostility to other safety initiatives. This potential, too, was viewed as an aspect of the statutory requirement of "practicability" (*id.* at 94a; 15 U.S.C. 1392(a)). In addition, when the risk that retention of a standard designed to advance the cause of traffic safety might actually produce significant *adverse* safety consequences was considered

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[13] The legislative history makes clear that the Secretary is to consider reasonableness of cost, feasibility, and economic factors. S. Rep. No. 1301, 89th Cong., 2d Sess. 6 (1966); H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966). See also *H & H Tire Co.* v. *United States Department of Transportation*, 471 F.2d 350, 353-354 (7th Cir. 1972).

[14] Quoting the 1976 decision of Secretary Coleman declining to mandate the passive restraint requirements for this very reason.

together with the uncertain nature of any *positive* benefits the standard might produce, the agency was reinforced in the conclusion that retention would not "meet the need for motor vehicle safety" (Pet. App. 114a).

The conclusion reached by NHTSA regarding the potentially adverse effects of the passive restraint requirement on the public attitude toward safety is the same as that reached by Secretary Coleman in 1976, before Modified Standard 208 was promulgated by Secretary Adams. The D.C. Circuit itself recognized in its *Pacific Legal Foundation* decision that the public resistance to such restraints is a factor that must be considered and that its resolution is necessarily a matter of judgment for the Secretary. 593 F.2d at 1345. There plainly was no "clear error of judgment" in the agency's analysis of this factor.

d. NHTSA was confronted in this case with competing considerations that were not strictly quantifiable, and it might well be that reasonable minds could differ as to the conclusion to be drawn. But however that may be, it surely cannot be said that either decision—to proceed with the passive restraint standard or to rescind—is arbitrary and capricious. The constantly changing views of successive Secretaries of Transportation over the last decade on an issue that has received such thorough attention sufficiently demonstrates this fact. It therefore is especially manifest here that the court below, in erecting a presumption in favor of the Standard issued in 1977 (see pages 22-24, *infra*), has simply substituted its judgment for that of the agency regarding the manner in which this difficult issue should be resolved.

3. Despite NHTSA's thorough and reasoned consideration of the relevant factors after a reopening and de novo reexamination of the passive restraint issue, the court of appeals held that NHTSA's rescission of the passive restraint requirement was arbitrary and capricious. The court advanced two principal reasons for its conclusion:

a. The court first held that it was not sufficient, in order for NHTSA to rescind the passive restraint requirement, that there was "substantial uncertainty" as to usage rates and therefore as to whether the requirement would now produce significant safety benefits as a result of changes in the critical assumptions on which its promulgation was based. Rather, in the court of appeals' view, NHTSA must affirmatively demonstrate to the satisfaction of the court that Modified Standard 208 will *not* produce the benefits on which its promulgation in 1977 was premised (Pet. App. 51a). And if NHTSA is unable to convince the court on the basis of evidence now in the record or otherwise at its disposal, then, in the court's words, "only a well justified refusal to seek more evidence could render rescission non-arbitrary" (*id.* at 53a). This unprecedented holding is flatly inconsistent with the limited role of a reviewing court under the arbitrary and capricious standard.

The only support the court was able to offer for its holding was to state the point in reverse: it would be unreasonable, the court explained, for an agency to promulgate a regulation in the first instance simply because of "substantial uncertainty" that the status quo was any better (Pet. App. 51a). So here, the court believed, a decision to rescind a regulation could not rest on "substantial uncertainty" alone. This conclusion is both illogical and directly inconsistent with the statutory scheme.

The court of appeals is quite correct that the Secretary would be justified in declining to promulgate a standard in the first instance if he were uncertain that the standard would be better than no standard at all, because in that event the Secretary may well not be able to find that the proposal satisfied the statutory criteria. But the court of appeals drew the wrong conclusion from its observation. It is precisely because the Secretary reasonably may decline to *issue* a safety standard in the first instance if he has substantial doubts about its efficacy

that the Secretary also may decline to *retain* such a standard if he has similar doubts. For in the latter situation, no less than the former, the Secretary may be unable to make the affirmative findings required by the Act for a standard to be in effect: that it be practicable, objective, and meet the need for safety.[15]

Thus, where, as here, an agency has undertaken a thorough de novo reexamination of the circumstances to which an existing rule is addressed and in the end is uncertain about whether it will in fact serve its intended purpose, the agency cannot be thought to act arbitrarily and capriciously by rescinding the rule.[16] Surely it is well within the agency's discretion to conclude that the public interest would be better served by resolving doubts against retaining the rule, especially if the burdens are of the magnitude of those imposed by Modified Standard 208. This Court has stressed that agencies must retain broad flexibility to adapt their regulatory policies to changing circumstances and that their decisions are entitled to great deference where, as here, those decisions are inherently judgmental or predictive in nature and necessarily are based on imprecise or even nonexistent data. See, *e.g.*, *FCC* v. *WNCN Listeners Guild*, 450 U.C. 582, 594-595 (1981); *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). The deference owed to the administrative agency is even greater in this case, because Standard 208 has not yet been given effect and thus still is, in substance, a prospective regulatory

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[15] It is important to recall that while the Act requires the Secretary to make such affirmative findings before he may put a standard into effect, it requires no such findings for there to be an *absence* of a standard in a given area. Hence, the statute essentially embodies a congressional presumption *against* regulation, which may be overcome only in specifically defined circumstances. As noted above, the court of appeals' opinion embodies the opposite presumption, at least where a regulation has been placed in effect.

[16] Of course, the agency's uncertainty must be well founded, but here the court of appeals agreed that several of NHTSA's concerns were reasonable (Pet. App. 50a-51a).

policy.[17] The decision below, in contrast, casts the court in the role of a jealous guardian of existing regulations, removing this discretion from the agency and requiring the agency instead to prove to the satisfaction of the court that the regulation no longer is justified. This intrusion into agency decisionmaking is wholly unwarranted.

b. The court of appeals further erred in reversing NHTSA's decision to rescind the passive restraint requirement on the ground that NHTSA should have considered certain regulatory alternatives identified by the court. NHTSA did, of course, consider the three alternatives it had proposed in the Notice of Proposed Rulemaking—a revised compliance schedule, simultaneous compliance, and deletion of any requirement for the front center seating position—and the court of appeals observed that NHTSA's treatment of these alternatives was "impressively thorough and careful" (Pet. App. 55a). This should have ended the inquiry, even assuming it was warranted to this extent.

The court of appeals concluded, however, that NHTSA also should have considered the alternatives of barring compliance with the passive restraint standard by means of detachable belts[18] or requiring compliance only by in-

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[17] Because Modified Standard 208 has never gone into effect, it is especially inappropriate to require NHTSA to prove the negative the court would require it to prove. Unlike an agency that seeks to revoke a regulation that has been in effect for some time, NHTSA can furnish the court with no concrete data reflecting actual experience under the Standard.

[18] The court of appeals was quite wrong when it suggested that NHTSA's doubts about the effectiveness of detachable belts rendered those belts non-passive restraints (Pet. App. 57a-58a). When attached, detachable belts provide complete passive protection. The fact that members of the public might choose to keep these belts detached, and utilize them as manual belts, does not change the fact that they meet the requirements of Standard 208, with their detachability feature providing the emergency release required by the Standard. In any event, the court of appeals' suggestion that a detachable belt is not a "passive restraint" is a bootstrap. The

stallation of airbags. In fact, NHTSA *did* consider whether it should mandate some kind of use-compelling device, such as continuous belts. NHTSA concluded that it should not, based on past congressional reaction to use-compelling devices, public fears about being trapped, and the possible complications of extrication (Pet. App. 109a-112a). These reasons, tied directly to the statutory criteria of practicability and the need for safety, fully supported rejection of this alternative.

In any event, since the Department of Transportation issued its original Standard 208 in 1967, even minor adjustments to the Standard have been identified in notices of proposed rulemaking before adoption. In the present case, however, neither alternative suggested by the court was proposed in NHTSA's April 1981 notice concerning passive restraints, in contrast to the three alternatives the court found NHTSA to have considered in a satisfactory manner. Yet, the two alternatives the court identified would have required a major revision of Modified Standard 208 and would have imposed substantial burdens on manufacturers and the public. In these circumstances, had NHTSA adopted one of the alternatives suggested by the court, it may have faced challenges from the manufacturers and others on the ground that its notice did not give adequate warning that such a rule might be adopted. See, *e.g.*, *Kollett* v. *Harris*, 619 F.2d 134, 144 (1st Cir. 1980); *Rodway* v. *United States Department of Agriculture*, 514 F.2d 809, 815-815 (D.C. Cir. 1975); *Wagner Electric Corp.* v. *Volpe*, 466 F.2d 1013, 1019 (3d Cir. 1972). See also *Eli Lilly & Co.* v. *Costle*, 444

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issue before the court of appeals was not whether a detachable belt satisfied the "passive restraint" terms of the *Standard*; a standard expressed in "passive restraint" terms is not compelled by the Act. The court was required to review NHTSA's decision under the explicit *statutory* criteria of practicability, reasonableness, and safety, upon which the Secretary had relied, irrespective of its own views of what may constitute an "active" or "passive" restraint as a theoretical matter.

U.S. 1096, 1097-1098 (1980) (Rehnquist and Powell, JJ., dissenting from the denial of certiorari).

In addition, under the APA, there was nothing to prevent NHTSA from determining that the existing Standard was inappropriate and should be rescinded, but that other alternatives might be considered in a new rulemaking proceeding initiated by NHTSA or requested in a petition for rulemaking filed by an interested party. The court of appeals should not have mandated a different procedure by insisting that the alternatives it preferred be considered as a condition precedent to rescission. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*.[19]

4. The court of appeals aggravated its intrusion into the administrative process by requiring in its August 4 order that Modified Standard 208 go into effect in its present form on September 1, 1983, unless NHTSA demonstrates—again to the satisfaction of the court—that this date is not achievable (Pet. App. 79a-82a). This order is inconsistent with the court's June 1 opinion, in which it rejected the suggestion by proponents of the Standard that it require compliance by a date certain and instead contemplated a "remand" to NHTSA for further proceedings to "resolve" questions raised in the court's opinion (*id.* at 71a-75a, 78a). Yet the court offered no explanation on August 4 for its departure from its earlier view, other than simply to assert that "additional rulemaking is not required before Standard 208 takes effect" (*id.* at 82a). The court may well be

[19] For the reasons fully stated by petitioners in Nos. 82-354 (Pet. 11-16) and 82-355 (Pet. 7-14), the court of appeals also plainly erred in viewing the history of congressional consideration of passive restraints as somehow narrowing the scope of the agency's statutory discretion to modify the Standard, since Congress never enacted a law requiring the Secretary to adopt such a standard. Congress knows how to direct the Secretary to promulgate a particular standard when it wishes. See, *e.g.*, 15 U.S.C. 1392(i)(1)(A)(ii) (requiring the Secretary to promulgate safety standards for school buses, including "[i]nterior protection for occupants.").

correct, if one accepts the reasoning of its opinion that Modified Standard 208 was not validly rescinded by NHTSA. But the court's glib observation obviously both misses the point of the effective date issue and ignores reality.

Even if Modified Standard 208 was not validly revised by NHTSA, it makes no sense whatever in the present circumstances to order compliance by a date certain. Modified Standard 208 has never become operative in its present form, despite the fact that it was issued in 1977, and even the court of appeals, despite its legal errors, contemplated that NHTSA still might be able validly to rescind, suspend, or revise the Standard on remand. No reason appears why the court should require a massive commitment of funds at this of all times, when the ultimate contours of Standard 208 cannot confidently be foreseen.

Beyond the manifest impracticalities of the court of appeals' approach, that court has impermissibly usurped to itself authority that Congress has specifically conferred on the Secretary. Under 15 U.S.C. 1392(c) and (e), an order establishing a safety standard and an order modifying or revoking such a standard shall take effect no later than one year from the date of the order "unless the *Secretary* finds, for good cause shown, that [a] * * * later effective date is in the public interest, and publishes his reasons for such findings" (emphasis added). It therefore is for the Secretary, not the court, to determine in the first instance whether and when Modified Standard 208 should go into effect in light of existing circumstances. This determination then would be subject to judicial review only under the arbitrary and capricious standard. Once the court of appeals identified errors in the agency's decision, the court was barred from further "dictating to the agency the methods, procedures, and time dimensions of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency." *Vermont Yankee Nuclear*

Power Corp. v. *NRDC*, *supra*, 435 U.S. at 544-545, quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976). The District of Columbia Circuit's blatant disregard for the respective roles of court and agency should not go unreviewed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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